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cannot be a fact in law which is not a fact in science; and it is unfortunate that courts should maintain a contest with science and the laws of nature, upon a question of fact which is within the province of science and outside the domain of our law." See, also, 1 Whart. Crim. Law. 148; 1 Bennett & Heard's Lead. Cas. 105-108; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500-506; 1 Russ. & Ry. Crown Cases 456; 4 Cox's Crown Cases 57.

This gradual change in the law of insanity has kept even pace with the treatment offered in the asylums to those afflicted with this disease. The monastic doctrine that the insane were possessed with evil spirits and were to be treated as criminals, held sway for many years after its founders had lost their control over the minds of men. As the true nature of insanity became known, and it was found to be a disease needing care and attention, the treatment of those thus diseased and the laws as to their criminal responsibility became more humane, until to-day we find the insane treated with a degree of kindness and consideration that was a stranger to them at the time such celebrated lawyers as Lord COKE and Lord HALE said their criminal responsibility was to be measured with that of the wild beasts, and when Hogarth gave us a representation of the Bedlam of his day.

C. LARUE MUNSON.

WILLIAMSPORT, Pa.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THOMAS SHERLOCK ET AL. v. CHARLES ALLING, ADMINISTRATOR OF SAPPINGTON.

Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the state; and as thus applied it constitutes no encroachment upon the commercial power of Congress.

The action of Congress as to a regulation of commerce or the liability for its infringement, is exclusive of state authority; but until some action is taken by Congress, the legislation of a state not directed against commerce or any of its regulations, but relating generally to the rights, duties and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or inter-state commerce, or persons engaged in such commerce.

The Act of March 30th 1852, "to provide for the better security of the lives of

passengers on board of vessels propelled in whole or part by steam, and for other purposes," does not exempt the owners and masters of a steam vessel and the vessel from liability for injuries caused by the negligence of its pilot or engineer, but makes them liable for all damages sustained by a passenger or his baggage from any neglect to comply with the provisions of the law, no matter where the fault may lie; and in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

The relation between the owner or master and pilot, as that of master and employee, is not changed by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors.

ERROR to the Supreme Court of Indiana.

In December 1868, the defendants (plaintiffs in error) were the owners of a line of steamers employed in navigating the river Ohio between Cincinnati, in Ohio, and Louisville, in Kentucky, for the purpose of carrying passengers, freight and the United States mail. On the fourth of that month, at night, two boats of the line, designated respectively as the United States and the America, collided at a point on the river opposite the main land of the state of Indiana. By the collision the hull of one of them was broken in, and a fire started, which burned the boat to the water's edge, destroying it and causing the death of one of its passengers by the name of Sappington, a citizen of Indiana. The administrator of the deceased brought the present action for his death in one of the courts of Common Pleas of Indiana, under a statute of that state, which provides "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission."

The complaint in the action alleged that the collision occurred within the territorial jurisdiction of Indiana, above the line of low-water mark of the river, and charged it generally to the careless and negligent navigation of the steamboat United States by the defendant's servants and officers of the vessel, but especially to the carelessness of the pilot, in running the same at too great a speed down the stream; in giving the first signal to the approaching boat as to the choice of sides of the river, contrary to the established custom of pilots navigating the Ohio, and the rules prescribed by the Act of Congress; and in not slackening the speed of the boat and giving a signal of alarm and danger until it was too late to avoid the collision.

To defeat this action the defendants relied upon substantially the following grounds of defence: first, that the injuries complained of occurred on the river Ohio beyond low-water mark on the Indiana side, and within the limits of the state of Kentucky; and that by a law of that state, an action for the death of a party from the carelessness of another could only be brought within one year from such death, which period had elapsed when the present action was brought; and, 2d, that at the time of the alleged injuries, the colliding boats were engaged in carrying on inter-state commerce under the laws of the United States, and the defendants, as their owners, were not liable for the injuries occurring in their navigation through the carelessness of their officers, except as prescribed by those laws; and that these did not cover the liability asserted by the plaintiff under the statute of Indiana.

T. D. Lincoln, for plaintiffs in error.

C. A. Korbly, for defendants in error.

The opinion of the court was delivered by

FIELD, J.—Under the first head no question is presented for consideration of which we can take cognisance. It is admitted that the territorial limits of Indiana extend to low-water mark on the north side of the river, and the jury found that the collision took place above that mark. It is, therefore, of no moment to the defendants that the Supreme Court of Indiana held that the state possessed concurrent jurisdiction with Kentucky on the river, under the Act of the Commonwealth of Virginia of 1789, providing for the erection of the district of Kentucky into an independent state, and that the legislation of Indiana could, for that reason, be equally enforced with respect to any matters occurring on the river, as with respect to similar matters occurring within her territorial limits on the land.

The questions for our consideration arise under the second head of the defence. Under this head it is contended that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is that as by both the common and maritime law

the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

In supposed support of this position, numerous decisions of this court are cited by counsel, to the effect that the states cannot by legislation, place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But upon an examination of the cases in which they were rendered it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge case*, 13 How. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 How. 227, the statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement in writing, setting forth the name of the vessel and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state in addition to those prescribed by Congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of Congress, as in *Brown v. Maryland*, 12 Wheat. 425, the *Tonnage Tax cases*, 12 Wallace 204, and *Welton v. Missouri*, 1 Otto 275, the legislation created, in the way of tax, license, or con-

dition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-state commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-state commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily

involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong. And it may be said generally, that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that as thus applied it constitutes no encroachment upon the commercial power of Congress: *United States v. Bevans*, 3 Wheat. 337.

In the case of *The Steamboat Company v. Chase*, 16 Wallace, this court sustained an action for a marine tort resulting in the death of the party injured, in the name of the administrator of the deceased, under a statute of Rhode Island, similar in its general features to the one of Indiana. There the deceased was killed whilst crossing Narraganset Bay in a sail-boat by collision with a steamer of the company; and though objections were taken and elaborately argued against the jurisdiction of the court, it was not even suggested that the right of action conferred by the statute, when applied to cases arising out of marine torts, in any way infringed upon the commercial power of Congress.

In addition to the objection urged to the statute of Indiana, the defendants also contended that as owners of the colliding vessels they were exempt from liability to the deceased as a passenger on one of them, and of course to his representatives, as the collision was caused without any fault of theirs, by the negligence of the

pilots; and they relied upon the 30th section of the Act of Congress of March 30th 1852, to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam. That act was in force when the injuries complained of in this case were committed, and its principal features have been retained in subsequent legislation. The section provided "that whenever damage is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, *if it happens through any neglect to comply with the provisions of law herein prescribed*, or through known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot and recover damages for any such injury caused as aforesaid by any such engineer or pilot:" 10 Statutes at Large 72.

It was argued that by this section Congress intended the exemption claimed. And confirmation of this view was found in the fact that the owners were obliged to take a pilot, and were restricted in their choice to those licensed by the government inspectors. It was supposed that the relation between owner and pilot, as that of master and employee, was thus changed, and that with the change the responsibility of the former for the negligence of the latter ceased. The court, however, proceeded through the trial upon a different theory of the position of the defendants. It held that as owners they were responsible for the conduct of all the officers and employees of the vessels, and that it was immaterial whether the vessels were or not at the time of the collision under the exclusive charge of the pilots. The instructions to the jury at least went to that extent. They in substance declared that, if the collision occurred within the territorial jurisdiction of Indiana, and was caused, without fault of the deceased, by the carelessness or misconduct of the defendants, or any of their agents, servants, or employees in navigating and managing the steamers, or either of them, the plaintiff was entitled to recover.

In support of the exemption the counsel of the defendants called

to our attention an opinion of the Supreme Court of Kentucky in a similar case arising upon the same collision, where such exemption was upheld. The opinion is marked by the usual ability which characterizes the judgments of that court, but after much hesitation and doubt, we have been compelled to dissent from its conclusions. The statute appears to us to declare that the owners and master of a steam-vessel, and the vessel itself, shall be liable for all damages sustained by a passenger or his baggage from any neglect to comply with the provisions of the law, no matter where the fault may lie; and that in addition to this remedy any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The statute of England, which exempts the owners of vessels and the vessels from liability for faults of pilots, pilotage there being compulsory and pilots being licensed, has not met with much commendation from the admiralty courts, and the general tendency of their adjudications has been to construe the exemption with great strictness. This course of decision is very fully stated in the exposition of the law made by Mr. Justice SWAYNE in the case of *The China*, 7 Wallace, where this court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of *The Halley*, Law Rep. 2 Adm. & Eccles. 15, decided as recently as 1867, Sir ROBERT PHILLIMORE strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law, which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner, and observed that no one acquainted with the working of the law could be ignorant that it was fruitful in injustice. The doctrine that the owners are responsible for the acts of their agents and employees ought not to be discarded because the selection of a pilot by the owner is limited to those who by the state have been found by examination to possess the requisite knowledge of the difficulties of local navigation and the requisite skill to conduct a vessel through them. "As a general rule," says Mr. Justice GRIER, in the case of *The Creole*, "masters of vessels are not expected to be and cannot be acquainted with the rocks and shoals on every coast" (and we may add, with the

currents and shoals of every river), "nor able to conduct a vessel safely into every port. Nor can the absent owners or their agent, the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant, but are not in a situation to test or judge of his qualifications, and have not, therefore, the information necessary to choice. The pilot laws kindly interfere and do that for the owners which they could not do for themselves:" *Smith v. The Creole*, 2 Wall. Jr. 485. And the learned justice observes, that in such cases where a pilot is required to be taken from those licensed, the relation of master and servant is not changed; that the pilot continues the servant of the owners, acting in their employ and receiving wages for services rendered to them, and that the fact that he is selected for them by persons more capable of judging of his qualifications, cannot alter the relation.

And in the case of *The Halley*, Sir ROBERT PHILLIMORE upon this subject says: "I do not quite understand why, because the state insists, on the one hand, upon all persons who exercise the office of pilot, within certain districts, being duly educated for the purpose and having a certificate of their fitness, and insists, on the other hand, that the master shall, within these districts, take one of these persons on board to superintend the steering of his vessel, the usual relation of owner and servant is to be entirely at an end; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates."

By the common law the owners are responsible for the damages committed by their vessel, without any reference to the particular agent by whose negligence the injury was committed. By the maritime law the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law the vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of responsibility between the owners and employees for the negligence which resulted in the injury. Any departure from this liability of the owners or of the vessel, except as the liability of the former may be released by a surrender of the vessel, has been found in practice to work great injustice. The statute ought to be very clear before we should conclude that any such departure was intended by Congress. The section we have cited would not justify such a conclusion. Its

language readily admits of the construction we have given, and that construction is in harmony with the purposes of the act.

We are of opinion that the judgment of the Supreme Court of Indiana was correct, and it is therefore affirmed.

In sect. 8, art. 1, of the Constitution, there is conferred upon Congress the power "To regulate commerce with foreign nations and among the several states and with the Indian tribes." It produced perhaps the earliest conflicts between State and Federal jurisdiction, and the cases which arose under it show more able controversy at the bar and disagreement upon the bench than any in the United States reports. The admirable opinion of MARSHALL, C. J., in the case of *Gibbons v. Ogden*, 3 Wheat. 1, argued in the year 1824, by Webster, Wirt and others, was the first delivered upon the clause. The legislature of New York had conferred upon certain persons the exclusive right of navigating the waters of that state by steam vessels. The owners of a steam coaster duly licensed and enrolled under the laws of the United States, to be employed in the coasting trade, were enjoined from navigating the waters of New York. The constitutionality of the law was sustained in all the state courts, but the Supreme Court of the United States declared it repugnant to the power to regulate commerce as actually carried out in the License Act. "In discussing the question whether this power is still in the states in the case under consideration we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation :'" p. 200. This case was *res nova*: not an authority, it is believed, was cited by the court, and it is interesting as belonging to that class of

questions in which the earliest decision may be said to have made and not merely declared what was right. But for many years two different constructions were put upon it by the ablest members of the Federal court.

Brown v. The State of Maryland, 12 Wheat. 419 (1827), argued by Meredith, Johnson, Taney and Wirt, the opinion of the court being delivered by MARSHALL, C. J., accompanied by a dissent from THOMPSON, J., is another early constitutional landmark. The state of Maryland had required all persons selling imported merchandise in the original bale or package to pay a license, and the court held the law unconstitutional, because it laid an impost, and also because it was a regulation of commerce in violation of an existing regulation of the United States, viz.: the Importation Laws; which having conferred the right to import, conferred with it the right to sell. As the law was held to be in violation of an existing regulation of commerce the court were saved, as in *Gibbons v. Ogden*, from saying what would be the case if Congress had made no regulation, but the subject was often referred to in the argument, especially by Mr. Taney, who never abandoned the opinion which he then expressed.

In *Willson v. The Blackbird Marsh Creek Co.*, 2 Pet. 250 (1829), the question was fairly raised, but the report of the case shows very little of the elaboration and care that the discussion of the principle deserved. The constitutionality of a law of the state of Delaware, authorizing certain persons to build a dam in a small navigable stream emptying into the river Delaware, was before the court. MARSHALL, C. J.,

said, "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognisance.

"The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.' If Congress had passed any act which bore upon the case, any act in execution of that power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act." This case, evidently not much regarded at the time, has proved the calculus of the courts. One school contending that Ch. Justice MARSHALL in it defined the opinion he delivered in *Gibbons v. Ogden*, by holding that the power to regulate commerce is only exclusive of the states when exercised and not when dormant; while the other contended that the opinion, regarded in the light of the facts, meant to say that such small navigable creeks never were within the constitutional pro-

vision, and that therefore the state regulation of them, especially by laws intended to preserve the health of its citizens, was above suspicion.

In *New York v. Miln*, 11 Peters 151 (1837), the court held laws of New York requiring masters of foreign vessels to make certain reports on entering the harbors constitutional, as an exercise of police power and not a regulation of commerce. THOMPSON, J., delivered a separate opinion, concurring in the reasoning of BARBOUR, J., who delivered the opinion of the court, but taking the further ground (which the court determined to leave open as we learn from TANEY, C. J., in his opinion in the *Passenger Cases*), that the legislation was perfectly constitutional, even as a regulation of commerce, Congress not having exercised its power in conflict with the law. Judge STORY delivered a dissenting opinion, founded on *Gibbons v. Ogden* and *Brown v. The State of Maryland*, which he considered to establish the doctrine, that the power to regulate commerce is exclusive of the states. "In this opinion I have the consolation to know that I had the entire concurrence upon the same grounds of that great constitutional jurist the late Mr. Chief Justice MARSHALL. Having heard the former arguments his deliberate opinion was that the Act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of *Gibbons v. Ogden* and *Brown v. The State of Maryland*." He differed from THOMPSON, J., in everything but from the opinion expressed by the court only in holding the acts to be regulations of commerce; because he did not doubt that the states would properly exercise what are called police powers, if they did not come into conflict with actually existing commercial regulations of Congress.

In *The License Cases*, 5 How. 504 (1847), certain laws of Massachusetts, Rhode Island and New Hampshire, prohibiting the sale of liquor under certain gross amounts without a license, were held constitutional as a proper exercise of the reserved power of the states, and not in conflict with the general power of Congress to regulate commerce. The states having a right to regulate their internal traffic of retailing liquor these acts did not fall within *Brown v. The State of Maryland*, because they did not regulate the sale of liquors in the original package or as imported, but when they had become mingled with the general property of the state, and were offered for retail sale. The facts of the case presented under the law of New Hampshire made it more doubtful. A barrel of gin had been purchased by a merchant of Dover in Boston, and sold by him in New Hampshire in the cask in which it was imported. Therefore the very same question was raised as to commerce between the states that arose in *Brown v. The State of Maryland*, as to commerce with foreign nations. TANEY, C. J., distinguished the cases on the ground that Congress had actually regulated commerce with foreign nations by importation laws, while no laws had been passed to regulate trade between the states. He said: "It is well known that upon this subject a difference of opinion has existed and still exists among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear that the mere grant of power to the general government, cannot upon any just principles of construction be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred

upon Congress. Yet in my judgment the state may nevertheless, for the safety or convenience of trade or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress:" p. 579. Other justices, as McLEAN, WOODBURY and GRIER, preferred to sustain these laws as an exercise of the police power of the respective states, and not as regulations of commerce. *The Passenger Cases*, 7 How. 283 (1849), brought out all the slumbering differences. The question before the court was the constitutionality of certain statutes of New York and Massachusetts imposing taxes upon alien passengers arriving in the ports of those states. The case was argued at the greatest length by Webster, Choate, Ogden, Van Buren, Davis and others, and the judges delivered seriatim opinions. McLEAN, WAYNE, CATRON, GRIER and MCKINLEY held the laws unconstitutional. They concurred in holding the power of Congress to regulate commerce to be exclusive, and that the acts in question amounted to a regulation of commerce, while TANEY, C. J., and DANIEL, NELSON and WOODBURY, JJ., considered the power to regulate commerce not exclusive, and that the acts in question were police and not commercial regulations. In *Cooley v. The Board of Port Wardens*, 12 How. 300 (1851), pilot laws of the state of Pennsylvania were held to be regulations of commerce, and yet constitutional because Congress had not legislated upon the subject. CURTIS, J., delivered the opinion of the court. He said "entertaining these views we are brought directly and unavoidably to the consideration of the question whether the grant of the commercial power to Congress did *per se* deprive

the states of all power to regulate pilots. This question has never been decided by this court nor in our judgment has any case depending upon all the considerations which must govern this one come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded on the one side that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress as effectually and perfectly excludes the states from all future legislation on the subject as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition upon the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations: *Sturges v. Crowninshield*, 4 Wheat. 193; *Moore v. Houston*, 5 Id. 1; *Wilson v. Blackbird Creek Co.*, 2 Pet. 251. The court carefully confined the decision to the particular case of pilot laws. McLEAN, J.,

dissented, on the ground that the power in Congress was exclusive of the states. This was the first instance in which a state law admitted to be a regulation of commerce was held to be constitutional.

Then came *The Wheeling Bridge Case*, 13 How. 519 (1851), argued by Mr. Stanton, Mr. Johnson and others. The state of Virginia had authorized the construction of a bridge over the Ohio, which impeded the navigation of the river. It was contended that this was an infringement of the right of Congress to regulate commerce. McLEAN, J., delivered the opinion of the court. He said that Congress had regulated the subject. "Congress have not declared in terms that a state by the construction of bridges or otherwise shall not obstruct the navigation of the Ohio, but they have regulated upon it as before remarked by licensing vessels, establishing ports of entry, imposing duties on masters and other officers of boats, and inflicting severe penalties for neglect of those duties by which damage to life or property has resulted, and they have expressly mentioned the compact made by Virginia with Kentucky at the time of its admission into the Union, that the use and navigation of the river Ohio, so far as the territory of the proposed state or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States. Now an obstructed navigation cannot be said to be free:" p. 565. But TANEY, C. J. and DANIEL, J., dissenting, maintained that Congress, not having legislated upon the subject of the obstruction of navigable streams, or the height of bridges, the statute of Virginia was complete justification to the company. They relied upon *Wilson v. The Blackbird Creek Co.*, as an exactly similar case, and it is difficult to see why it is not so. Mc-

LEAN, J., in the *Passenger Cases*, said of it: "It must be admitted that the language of the eminent chief justice who wrote the opinion is less guarded than his opinions generally were on constitutional questions:" p. 397. "The construction of the dam was complained of, not as a regulation of commerce, but an obstruction of it; and the court held that as Congress had not assumed to control state legislation over those navigable creeks into which the tide flows, the judicial power could not do so. The act of the state was an internal and a police power to guard the health of its citizens. By the erection of the dam commerce could only be affected as charged consequentially and contingently. The state neither assumed nor exercised a commercial power:" p. 398. In this case he disposed of it by saying: "The Chief Justice said it was a matter of doubt whether the small creeks which the tide makes navigable a short distance, are within the general commercial regulations, and that in such cases of doubt it would be better for the court to follow the lead of Congress. Congress have led in regulating commerce on the Ohio, which brings the case within the rule laid down:" p. 566. It appears to us impossible to read the now noted case, and admit such an explanation of it. These cases were followed by *Smith v. Davenport*, 22 How. 227 (1859), and *Gilman v. Philadelphia*, 3 Wall. 713 (1865). The latter is interesting because it divided the court. The constitutionality of the law of Pennsylvania authorizing the construction of the Chestnut street bridge across the Schuylkill river at Philadelphia, was before the court. The majority distinguished it from the *Wheeling Bridge Case* on the ground that Congress had not regulated commerce on the Schuylkill river, and considered it governed by *Wilson v. The Blackbird Marsh Creek Co.*; while CLIFFORD, WAYNE and DAVIS, JJ.,

in a very powerful dissent, considered that the regulation of commerce on the Schuylkill was quite as substantial as that on the Ohio. NELSON, J., did not sit, so that the judges who were on the bench when *The Wheeling Bridge Case* was decided and who concurred with the majority in that case, differed in opinion in this one. This was followed by the *State Tonnage Tax Cases*, 12 Wall. 204 (1870), and *Ex parte McNeil*, 13 Id. 240 (1871). The principle may be now regarded as fixed that the commercial power of Congress is not necessarily exclusive of the states. In each particular instance it must be inquired whether the subject regulated is of such a nature as to require federal and to exclude state regulation.

In *Welton v. The State of Missouri*, 1 Otto 278, a law requiring persons carrying goods not the growth, product or manufacture of the state from place to place within it for sale to pay a license, was held unconstitutional. FIELD, J., said "so far as some of these instruments are concerned and some subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them; but when the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority:" p. 280. As commerce between the states is of national character and admits of uniformity of regulation the power of Congress over it is exclusive. Its inaction is equivalent to a declaration that inter-state commerce shall be free. If there be any rule at all upon the subject, this case states it and in a form which is a practical adoption of the views of TANEY, C. J., as opposed to those so tenaciously held by STORY and MCLEAN, JJ. Chief Justice MARSHALL, in *Sturges v. Crowninshield*, 4 Wheat. 193, in holding that the states might

constitutionally pass bankrupt acts in absence of general legislation upon the subject by Congress, expressed what now appears to be the true rule for construing all the powers conferred upon Congress. "Whenever the terms in which a power is granted to Congress and the nature of the power require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act upon it."

It does not appear from the opinion in the principal case or from the report of it in 44 Ind. 185, what the arguments of counsel were.

It appears to have been found by the jury that the death of Sappington, the plaintiff's intestate, was caused by the negligence of the pilot of the steamer *United States*, which was burned and sunk in the collision. The *United States* was a passenger steamer, engaged in inter-state commerce, and licensed under the Act of August 30th 1852, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam and for other purposes." The act regulates most carefully the equipment of steam passenger vessels as to their boilers, engines, decks, hulls, hose, pumps, axes, life-preservers; provides rules for passing, makes pilotage compulsory, &c. No license is to be granted until the provisions of the act are complied with. The pilot was regularly licensed under the act. The 30th sect. is as follows: "And be it further enacted, that whenever damage is sustained by any passenger or his baggage from explosion, fire, collision or other cause, the master and the owner of such vessel or either of them and the vessel shall be liable to each and every person so injured to the full amount of damage if it happens through any neglect to comply with the provisions of the law herein prescribed

or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of an engineer, or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers may sue such engineer or pilot and recover damages for any such injury caused as aforesaid by any such engineer or pilot:" 10 Statutes at Large 72.

By the maritime law the responsibility of the owners is limited to the value of the ship and freight. The vessel is regarded as a responsible thing bound for the performance of the contracts of the master, and to make good the consequences of his acts: *The Rebecca*, Ware 188; *The Phæbe*, Ware 263. Hence if the owners abandon a vessel and freight, or if they be exhausted by the claims there remains no further remedy against them personally.

The proceedings were always *in rem*. But it will be seen that the liability of the owners of steam passenger vessels is greatly increased by the act in question so that in certain contingencies they are personally responsible for the whole amount of damage.

The first ground taken by the plaintiff in error was that the law of Indiana interfered with the license conferred by the Act of 1852, and was therefore unconstitutional as in conflict with actually existing congressional regulations of commerce. This was dismissed by the court without much consideration. It was said this law is not a regulation of commerce, and cannot be in conflict with any regulation of Congress, because it has not legislated upon the subject. "It may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and

only indirectly and remotely affecting the operations of commerce is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit. In our judgment the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied it constitutes no encroachment upon the commercial power of Congress."

It must have been pressed upon the court that Congress might be regarded as having legislated upon the subject. Having legislated most carefully to prevent marine injuries, and having increased the remedies for them in a way that a state could not do, it might have been argued that Congress had legislated upon the whole subject. It did not provide for the surviving of actions in the case of death to the personal representatives, but what it omitted may have been as much a part of the regulation as what it expressed. In this case the vessel was a steamer, and the jury found by a *hysteron proteron* (44 Ind. 189) that it "sunk and burned up." Had she been a sailer no action as we have seen would have lain against the owners for any one living or dead. Indeed the plaintiff could have had no standing in court at all against the defendants if Congress had not regulated the subject of damages arising from marine torts or steam passenger vessels in the act. If it should be admitted that Congress intended to regulate the *whole* subject, then the law of Indiana, though not a regulation of commerce, would be unconstitutional, within the reasoning of *The Wheeling Bridge case*, *supra*. It certainly does seem to im-

pose a new obligation and liability upon owners of steam passenger vessels engaged in inter-state commerce, and appears quite as inconsistent with the Act of 1852, as the law incorporating the Wheeling bridge was obnoxious to the commercial regulations of the river Ohio. We cannot help feeling, however, that the decision in that case was painfully come to, and that its weight is not increased by *Gilman v. Philadelphia*, in which the court shows a plain unwillingness to repeat the process.

The plaintiff in error appears to have contended in the second place that the act should be construed as intending to give a personal remedy against the owners for all loss occasioned by the neglect to comply with its provisions, but that where the loss, all its provisions being complied with, occurred solely through the negligence or wilful misconduct of the engineer or pilot, the owners should be exempted, and injured parties should have their remedy against the engineer or pilot. The equity of such a construction was sought to be confirmed by the fact that the statute made the employment of the pilot compulsory: sect. 34. A case arising out of the same collision, decided by the Court of Appeals of Kentucky, was cited in the argument and noticed in the opinion. Its title is *Speigleberg's Adm'r v. Shirley, &c.*, but we learn that a motion for a rehearing having been granted, the case was compromised, and, therefore, does not appear in the reports. The Court of Appeals, however, did adopt this construction *in toto*. They applied the ordinary principle of the common law that no one should be held responsible for the acts of another over whom he has no control. But it is well settled that up to the value of the vessel and freight, the owners are not relieved from liability for the acts of a pilot, even if his employment is compulsory. The court in the case of *The China*, 7 Wall. 53, following the

opinion of Judge GRIER, in *The Creole*, 2 Wall. Jr. 519, points out that the responsibility of the vessel "is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership from which he was discharged, either by the loss of his vessel or by abandoning it to the creditors;" or, as the court expresses it in the principal case: "By that law (the maritime law) the vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of responsibility between the owners and employees for the negligence which resulted in the injury." As the owners were responsible for the negligence of a compulsory pilot up to the value of the vessel by the maritime law, so the court considered that they would be responsible for it in the new field of personal liability created by the act, and they explained the express provision about the engineer or pilot as intended to give injured parties an additional remedy against them.

To this it might be answered that the remedy to recover damages occasioned by the "negligence, carelessness or wilful misconduct" of any one in his calling is not "additional" in the sense of being newly conferred by Congress,

because every one had it at common law. Nor is it additional in the sense that any one could recover twice for the same injury. And its presence might quite naturally be explained as showing an intention that the owners should not be personally liable when they were not directly in fault, viz.: When all the provisions of the act were complied with. Besides in favor of the construction it is to be considered that the offending vessel having been destroyed in this case, the liability of the owners did not exist by the maritime law at all, but by virtue of the statute, and, therefore, the reasoning drawn from the maritime law which concludes them up to the value of the vessel and freight, might not be applicable to them in the new field of statutory liability. On the contrary, in this field there would seem to be no impropriety in applying the common law doctrine of master and servant which made one responsible for the acts of another, if he had the right to control him. If the foundation of responsibility were authority the owners should not be held responsible for the negligence of a minister whom they did not choose, and could not control. There seems to be some reason for thinking that if in construing the Act of 1852, the Kentucky Court of Appeals erred in not considering maritime principles at all, the Supreme Court may have carried them too far.

H. G. W.

Supreme Judicial Court of Massachusetts.

GUSTAVUS D. DOWS AND ANOTHER v. GEORGE W. SWETT.

If A. pays a debt to B. by delivering him the note of C. and orally guarantees the payment thereof, such guaranty is void under the Statute of Frauds—his own original debt being thereby discharged.

CONTRACT upon a promise of the defendant to pay the note of a third person to the plaintiffs, upon default of the promisor. The answer set up the Statute of Frauds.

At the trial in the Superior Court, before PITMAN, J., without